

This is a claim for a July 15, 2008, accident and resulting injury to claimant's neck. In the August 19, 2009, Award, Judge Hursh awarded claimant permanent partial disability

benefits based upon a 15 percent whole person functional impairment.¹ This finding is consistent with the testimony offered by both Dr. Adrian P. Jackson (who assigned a 15 percent impairment) and by Dr. P. Brent Koprivica (who assigned an overall 40 percent impairment but acknowledged a 25 percent preexisting impairment, leaving claimant with a net impairment of 15 percent).

Claimant argues it is illogical to conclude that the prior 2005 fusion at C6-7 that left him with no residual deficits or symptoms should be considered substantially more impairing than his 2008 fusion at C5-6, which has resulted in pain, numbness, weakness of the arm and restrictions of cervical range of motion. Claimant requests that the Board modify his award and award him a 20 percent whole person functional impairment for the July 2008 injury.

Respondent contends the Board should affirm the Award.

The nature and extent of claimant's functional impairment is the only issue before the Board on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The claimant was employed as a concrete finisher. On July 15, 2008, he felt a pop in his neck while lifting a piece of plywood and later experienced cervical spine pain and numbness into his left arm. Dr. Adrian P. Jackson treated the injury and diagnosed a herniated disc at the C5-6 level and radiculopathy. Dr. Jackson performed an anterior cervical discectomy and fusion at that level in November 2008. In that surgery the doctor also removed hardware from a 2005 fusion that had been performed at the C6-7 level. Claimant presented no residual symptoms from the 2005 surgery.

Neck injuries do not appear on the K.S.A. 44-510d schedule of injuries, so permanent partial disability is determined pursuant to K.S.A. 44-510e.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American

¹ All impairment ratings are to the body as a whole unless otherwise indicated.

Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.²

Dr. Jackson found the claimant's July 2008 injury resulted in a 15 percent whole person permanent partial impairment. His rating was based on the *AMA Guides*.³

Dr. P. Brent Koprivica examined the claimant at claimant's attorney's request in March 2009. He stated claimant's July 2008 injury qualified for a Diagnosis-Related Estimates (DRE) Category IV impairment, 25 percent, for loss of motion segment integrity.

The claimant argues that the Judge erred when he reduced the present award due to preexisting impairment pursuant to K.S.A. 44-501(c). Claimant contends there is no evidence in the record to support the finding and conclusion that the July 2008 injury to claimant's C5-6 disc and resultant fusion represented an aggravation to the prior fusion at C6-7. The claimant reported no residual symptoms from the C6-7 fusion. He also returned to work as a concrete finisher without pain, numbness or restriction of cervical motion.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the later injury is an aggravation of a preexisting condition. The Act reads, in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁴

Respondent argues that the Board's *Bossing*⁵ decision supports the Judge's conclusion that a preexisting condition existed. While the facts in the instant case and *Bossing* are quite similar, the instant case can be distinguished from *Bossing*. In *Bossing*, the evidence was uncontroverted that the injured worker had a preexisting impairment. In the instant case, the evidence as to a preexisting impairment is not uncontroverted. And further, there is insufficient evidence to conclude the claimant had a preexisting condition. Thus, the Board disagrees with the Judge's determination that a functional impairment preexisted in the instant case.

² K.S.A. 44-510e(a).

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁴ K.S.A. 2008 Supp. 44-501(c).

⁵ *Bossing v. GNB Battery Technologies*, No. 256,607, 2006 WL 546107 (Kan. WCAB Feb. 24, 2006).

Now that the Board has determined no preexisting functional impairment exists, the Board must reconcile the different ratings assigned to the claimant's July 2008 injury by the two experts. Dr. Jackson found a 15 percent whole person impairment, DRE Category III. Dr. Koprivica found a rating of a 25 percent whole person impairment, DRE Category IV. Both experts provided reasonable explanations for their ratings. Thus, the Board assigns equal weight to both ratings and finds that the appropriate conclusion is to find the claimant's impairment lies between DRE Category III and DRE Category IV and the whole person impairment is deemed to be 20 percent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the August 19, 2009, Award entered by Judge Hursh.

Brett E. Jarrett is granted compensation from Oasis Outsourcing, Inc., and its insurance carrier for a July 15, 2008, accident and resulting disability. Based upon an average weekly wage of \$691.24, Mr. Jarrett is entitled to receive 28.29 weeks of temporary total disability benefits at \$460.85 per week, or \$13,037.45, plus 80.34 weeks of permanent partial general disability benefits at \$460.85 per week, or \$37,024.69, for a 20 percent permanent partial general disability, making a total award of \$50,062.14.

As of January 6, 2010, there is due and owing to Mr. Jarrett 28.29 weeks of temporary total disability compensation at \$460.85 per week, or \$13,037.45, plus 48.86 weeks of permanent partial general disability compensation at \$460.85 per week, or \$22,517.13, for a total due and owing of \$35,554.58, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$14,507.56 shall be paid at \$460.85 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

⁶ K.S.A. 2008 Supp. 44-555c(k).

Dated this ____ day of January, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge